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85- 6

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HARRY H. ZUCKER, PAUL SAPIENZA,
SAMUEL ACKER AND EDWARD F. CORCORAN,
Petitioners,

v.

THE UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CHARLES A. HOBBIE *
Staff Counsel
MARK D. ROTH
General Counsel
American Federation of
Government Employees,
AFL-CIO
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 737-8700

* Counsel of Record

July 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the 1976 amendment to the Civil Service Retirement Act unconstitutionally diminished retroactively federal retirees' vested property rights in retirement benefits and violated such retirees' property rights without due process of law?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Donald Devine, as Director of the Office of Personnel Management, and the following members and employees of the Merit Systems Protection Board (MSPB), were parties-respondent in the court of appeals and district court: James Cardinal, Herbert Ellingswood, Arthur Joseph, Joseph E. Livingston, Bonita Kirkland, Otis L. Packwood, Mitchel Kastner, and Joseph K. Riotto.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PRELIMINARY STATEMENT

Petitioners Harry H. Zucker *et al.* petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 758 F.2d 637. The opinion of the district court (App., *infra*, 8a-14a) is reported at 578 F. Supp. 1239.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 15a) was entered on April 3, 1985. This petition for a writ of certiorari was filed on July 2, 1985, within 90 days of the date of the entry of judgment below. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the Civil Service Retirement Act, now codified in 5 U.S.C. §§ 8331-8348, as amended by Pub. L. No. 91-93, 83 Stat. 139 (1969) and by Pub. L. No. 94-440, 90 Stat. 1462 (1976), and particularly section 8340, which provides for cost-of-living adjustments with respect to annuities for eligible employees payable from the Civil Service Retirement and Disability Fund.

5 U.S.C. § 8340(b), as amended in 1969, provided in pertinent part that:

> Each month the Commission shall determine the percent change in the price index. Effective the first day of the third month that begins after the price index change equals a rise of at least 3 percent for 3 consecutive months over the price index for the base month, each annuity payable from the Fund having a commencing date not later than that effective date shall be increased by 1 percent plus the percent rise in the price index (calculated on the highest level of the price index during the 3 consecutive months) adjusted to the nearest 1/10 of 1 percent.

5 U.S.C. § 8340(b) (1969).

5 U.S.C. § 8340(b), as amended in 1976, provided in pertinent part that:

> The Commission shall—
>
> (A) on January 1 of each year, or within a reasonable time thereafter, determine the percent change in the price index published for December of the preceding year over the price index published for June of the preceding year, and
>
> (B) on July 1 of each year, or within a reasonable time thereafter, determine the percent change in the price index published for June of such year over the price index published for December of the preceding year.

(2) If in any year the percent change determined under either paragraph (1)(A) or (1)(B) indicates a rise in the price index then—

(A) effective March 1 of such year, in the case of an increase under paragraph (1)(A), each annuity payable from the Fund having a commencing date not later than such March 1 shall be increased by the percent change computed under such paragraph, adjusted to the nearest 1/10 of 1 percent, or

(B) effective September 1 of such year, in the case of an increase under paragraph (1)(B), each annuity payable from the Fund having a commencing date not later than such September 1 shall be increased by the percent change computed under such paragraph, adjusted to the nearest 1/10 of 1 percent.

5 U.S.C. § 8340(b) as amended by Pub. L. No. 94-440, Title XIII, § 1306(a), (c)(1), 90 Stat. 1462.

STATEMENT OF THE CASE

1. Petitioners are retired employees of various agencies of the United States Government within the coverage of the United States Civil Service Retirement System (hereinafter "Retirement System") established by Congress in 1920. App., *infra*, 9a. They receive benefits under the Civil Service Retirement Act, now codified at 5 U.S.C. §§ 8331-8348 (*id.* at 1a). The Retirement Act provides, *inter alia*, that employees covered thereunder are "entitled to an annuity" upon retirement after specified periods of service, payable from the Civil Service Retirement and Disability Fund ("Fund") (*id.* at 9a). 5 U.S.C. § 8336.

This Fund is derived from employee contributions (5 U.S.C. § 8334(a)(1)), matching contributions by the employing agency (*id.*), and contributions by the United States Government out of its general revenues (App., *infra*, 10a). 5 U.S.C. § 8348(f) and (g). The latter in-

clude payments of interest by the Department of Treasury on what is termed the "unfunded liability" of the Fund—the excess of estimated benefits payable over otherwise available sources of funding, including employee and employer contributions—as well as payments to amortize over a thirty-year period any "unfunded liability" which results from new or liberalized benefits enacted into law, excluding any such liability which results from cost-of-living increases (*id.*).

In 1962 Congress amended the Retirement Act to provide an automatic cost-of-living adjustment ("COLA") with respect to annuities for eligible retirees based on the change in the price index (*id.* at 2a). Postal Service and Federal Employees Salary Act of 1962, Pub. L. No. 87-793, 76 Stat. 869. The legal issue in question pertains to 5 U.S.C. § 8340, which provides for COLAs. Section 8340(b) was amended by Pub. L. No. 91-93, 83 Stat. 139 (1969) to provide for 1% to be added on top of the COLA ("1% add-on") (*id.*). As a result of the amendment each employee's contribution to the Fund was raised from 6½% of the basic pay to 7% (*id.* at 10a).

On October 1, 1976, Congress rescinded that portion of the 1969 amendment which authorized the 1% add-on in addition to the cost-of-living increase. Legislative Branch Appropriation Act of 1976, Pub. L. No. 94-440, 90 Stat. 1462 (*id.* at 9a). Subsequent adjustments to annuities pursuant to section 8340 were based solely on changes in the cost of living, as a consequence (*id.* at 9a-10a). See 5 U.S.C. § 8340(b) (1982). In addition, any determinations concerning COLAs were made twice a year by operation of the amendment instead of on a monthly basis (*id.*). COLAs, if required, could be made twice, rather than four times, annually, (*id.*).

2. The petitioning retirees filed suit in the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 1346, after exhausting

their administrative remedies (*id.* at 2a, 10a-11a). Retirees Zucker and Sapienza, who retired prior to the 1976 amendment, claimed that the retirement benefits due them at the time of enactment constituted an earned, vested property right which was retroactively and unconstitutionally diminished from March 1, 1976, under the terms of Public Law 94-440, enacted on October 1, 1976 (*id.* at 11a). All four petitioning retirees—including the two retirees who retired after the 1976 amendment—additionally alleged that Public Law 94-440 violated their contractual, vested, and property rights without due process of law and without payment of just compensation (*id.*).

The district court held that the retirees did not have a constitutionally protected property interest (*id.* at 11a). In reaching this determination the court stated that " 'a legitimate claim of entitlement' to a government benefit does not transform the benefit itself into a vested right. Rather, due process 'property interests' in public benefits are 'limited, as a general rule, by the governmental power to remove, through prescribed procedures, the underlying source of those benefits.' *See Kizas v. Webster*, 707 F.2d 524 (D.C. Cir. 1983)." App., *infra*, 11a.

The district court also rejected the proposition that there is a vested right or contractual right to "retired pay," finding that such pay "is dependent upon statutory right rather than common law rules governing private contracts. *Flemming v. Nestor*, 363 U.S. 603, 610, 80 S.Ct. 1367, 1371, 4 L.Ed.2d 1435 (1960); *Goodley v. United States*, 441 F.2d 1175, 194 Ct.Cl. 829 (1971); *See also Clark v. United States*, 691 F.2d 837 (7th Cir. 1982)." *Id.* at 12a. All of petitioners' claims, the court asserted, derived solely from the Retirement Act and were, thus, mere statutory entitlements rather than property rights. *Id.*

Because there is, furthermore, neither a contractual relationship between a public employer and the employee

nor contractual liability running from the government to an employee, petitioners' contractual claims were also meritless, according to the district court. *Id.*, citing *Shaw v. United States*, 640 F.2d 1254 (Ct.Cl. 1981) and *Kania v. United States*, 650 F.2d 264 (Ct.Cl. 1981).

Analogizing to Social Security cases and finding that, as in social security benefits, annuities payable under the Retirement System are not contingent on employees' contributions, the court held that such contributions do not preclude Congress from amending the Retirement Act subject to the due process limitations against arbitrary action that has no rational basis. *Id.* at 13a, citing *Flemming v. Nestor, supra*, 363 U.S. at 619-611, 80 S.Ct. at 1372-1373. Since Congress had increased employee contributions from 6½ to 7% by means of the 1969 amendment (Pub. L. No. 91-93, *supra*) to insure against depletion of the Retirement Fund for future beneficiaries, the court reasoned, a similar rationale supported the challenged 1976 elimination of the 1% add-on. *Id.* Thus, Pub. L. No. 94-440 had a rational justification and was neither arbitrary, in any event, nor unconstitutional. *Id.* Accordingly, the court dismissed petitioners' complaint in its entirety, granting the respondents' motion for summary judgment.

3. Upon appeal to the United States Court of Appeals for the Federal Circuit—which had jurisdiction under 28 U.S.C. § 1295(a)(2) because the retirees' suit was based on 28 U.S.C. § 1346—petitioners continued to press their constitutional claims. App., *infra*, 2a. The court of appeals affirmed the district court's dismissal of the case.

The court of appeals' decision rejected petitioners' contention that they had a property interest in COLAs, stating:

> Although the retirees may have a protected property interest when they are entitled to immediate

> payments under preexisting law, *i.e.*, the payment of an annuity upon retirement, their entitlement to any post-retirement increases in that annuity stems from the independent source that creates and defines their property interest in same, *i.e.*, the COLA provision of the Civil Service Retirement Act, 5 U.S.C. § 8340. Until a retiree becomes eligible to receive a particular COLA, his or her right to that adjustment is subject to any lawful changes made to the section (5 U.S.C. § 8340) from which the claim to entitlement arises.

Id. at 3a-4a.

Furthermore, the court found, "legislative acts adjusting the burdens and benefits of economic life have 'a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.' *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976)." App., *infra*, 4a. The retirees had not carried this burden, the court held. *Id.*

Addressing the argument that the employees who retired before the COLA formula changed had a vested property right to the 1% add-on provision—as a form of deferred compensation—protected by the takings clause of the Fifth Amendment to the Constitution, the court held that "the COLA portion until received by way of an increased annuity is nothing more than a 'government fostered expectation' that retirees will be provided retirement annuities which will not be ravaged by inflation. Such an 'expectation' does not rise to the level of 'property' protected by the takings clause." *Id.* at 6a.

With respect to the petitioners' alternative position that a contract implied in fact arose as a consequence of their contributions to the Retirement Fund and that a unilateral change in entitlement under this contract constitutes a taking without just compensation, the court

acknowledged that some language in relevant decisions and in the legislative history of the Retirement Act supported the claim of a contract as far as the basic annuity is concerned. *Id.* at 7a. Post-retirement COLA benefits, however, are distinguishable from the right, contractual or otherwise, to a basic annuity, the court opined. *Id.* The government is not contractually bound, in short, to continue to provide COLA increases subsequent to retirement. *Id.*

Accordingly, the court of appeals affirmed the decision of the district court granting summary judgment in favor of the respondents. *Id.*

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the constitutional rights of the millions of retired and current federal civil service and postal employees with respect to their pension benefits under the Civil Service Retirement System. The court of appeals' decision permits the legislative branch to purport to confer a retirement benefit for millions of federal employees and then to frustrate the reasonable reliance such a benefit creates. By failing to distinguish between the property rights of the petitioning federal retirees and the rights of welfare or social security recipients, the decision invites a retirement system in the federal sector totally insulated from the due process and other substantive constitutional protections which are required to protect against legislative frustration of justifiable reliance on the part of federal pensioners.

The decision, moreover, contradicts the now generally accepted recognition that pensions are a part of the compensation of an employee to which, under ordinary circumstances, he is as much entitled as he is to the wages paid him for the work he had actually performed. In rejecting both a property-based approach and a contractual approach to the enforcement of federal retirement

benefits, the court of appeals' decision eviscerates constitutional protections basic to the institution of property and represents a giant step *backwards* in the development of the law of public pension rights.

This Court's review of the challenged legislation at this time is also necessary to counterbalance the current political pressures on federal pension policy. By promising future benefits instead of meeting federal employees' demands for increased salaries in the past, Congress maintained or increased government services without raising taxes. Congress has now chosen to renege on its commitments to its own employees and retirees rather than unpopularly raising taxes without a commensurate increase in public services. The petitioned-from decision has created a precedent which will inevitably result in facilitating unfettered Congressional incursions on constitutionally protected property rights. Review by this Court is plainly warranted.

1. Congress first provided for annuities to be paid to federal workers upon retirement when it passed the Civil Service Act of 1920 ("the 1920 Act"), ch. 195, 41 Stat. 614. The current statutes governing federal retirement annuities are codified at 5 U.S.C. §§ 8331-8348.

The retirement statutes provide that covered employees are entitled to an annuity upon retirement. The amount of the annuity is computed according to a formula based on years of service and the average of a worker's three highest annual salaries. 5 U.S.C. §§ 8339 & 8331(4).

Payments of annuities are made out of the Civil Service Retirement and Disability Fund ("Fund"). Congress has always provided that mandatory deductions from the wages of all covered federal employees would be placed into the Fund. Section 15 of the 1920 Act directed the Executive Branch to estimate the appropriations necessary to provide the benefits Congress had enacted.

The specific aspect of the retirement system at issue here is the cost-of-living adjustment to annuities which was enacted in 1962 and is currently codified at 5 U.S.C. § 8340. In 1969, while it was making a comprehensive overhaul of the retirement system, Congress amended § 8340(b) to provide for a cost-of-living adjustment that would ordinarily be one percentage point greater than the increase in the consumer price index over the relevant period (this increment is generally referred to as the "one-percent add-on" or "one-percent kicker"). Pub. L. No. 91-93, § 204(a), 83 Stat. 139, quoted *supra*, p. 2. In 1976, Congress enacted a measure providing that future cost-of-living adjustments would exclude that one percent add-on. Legislative Branch Appropriation Act of 1976, Pub. L. No. 94-440, § 1306(a), 90 Stat. 1439, 1462, quoted *supra*, pp. 2-3.

2. The court of appeals' decision that petitioners have no property interest in retirement benefits is inconsistent with the terms and legislative history of the Retirement Act.

a. The predominant congressional view expressed in the legislative history of the original Retirement Act of 1920 is that retirement benefits are in the nature of a contract or contract implied in fact and are both part of the compensation of, and paid for by, federal employees during the tenure of their employment.

That the benefits earned and paid for under the system were to be treated as compensation was signaled early in the debates surrounding the original Retirement Act of 1920. Representative Hammil, one of the active proponents of the legislation, made the point as follows:

> This pension bill must not be regarded as governmental generosity. Pensions are not gratuities and they should not be considered as such. They should be looked on as deferred wages—as payments which

> were not disbursed at the time when they were earned.

59 Cong. Rec. 6,300 (1920).

In a similar vein, Representative Mann, another of the proponents of the legislation, noted that the benefit received under the retirement legislation, "is a part and parcel of the subject of the wage you pay." *Id.* at 6,378. This rejection of retirement benefits as a gratuity not only typified the intent of those who originally enacted the legislation, but also persisted through the various congresses that, from time to time, amended the law.

b. The pertinent statutory provision also confirms that Congress conceived and established retirement benefits as deferred compensation. More specifically, 5 U.S.C. § 8334(b) provides as follows:

> Each employee or member is deemed to consent and agree to these deductions [i.e., the employees' or members' contributions to the Retirement Fund] from basic pay. Notwithstanding any law or regulation affecting the pay of an employee or member, payment less these deductions is a full and complete discharge and acquittance of all claims and demands for regular services during the period covered by the payment, *except the right to the benefits to which the employee or member is entitled under this subchapter.*" [Emphasis added.]

This language derives from Section 9 of the original Civil Service Retirement Act, enacted May 22, 1920, 41 Stat. 614, as follows:

> That every employee coming within the provisions of this Act shall be deemed to consent and agree to the deductions from salary, pay or compensation as provided in Section 8 hereof, and payment less such deductions shall be a full and complete discharge and acquittance of all claims and demands whatsoever for all regular services rendered by such employee during the period covered by such payment

> except to the right of the benefits to which he or she shall be entitled under the provisions of this Act, notwithstanding the provisions of sections 167, 168 and 169 of the Revised Statutes of the United States, and of any other law, rule or regulation affecting the salary, pay or compensation of any person or persons employed in the civil service to whom this Act applies.

The language of Section 9, as with the successor formulation, is plain. It conveys clearly that the retirement benefits for which the employee qualifies are deferred compensation. Part of this compensation is paid to him/her at the time that the service is performed. Another part of the salary is withheld as retirement deductions. Compensation for the work performed has not and will not be paid in full until the employee has received his/her retirement benefits in full for the full term of the retirement.

Just as an employee's salary is guaranteed, so too, Congress has guaranteed annuity benefits to the employee as part of compensation. If this were not the case, Section 9 presumably would have stated simply that the payment of the salary less the retirement deductions would be a complete discharge and acquittance for services provided to the government. But, the language does not stop there. Instead, it guarantees "*benefits*" in addition to basic salary less deductions. Moreover, the choice of the word "*benefits*" in the plural was intended to mean more than one single benefit, such as the "one shot" return of the money contributed to the retirement fund by the employee.

The Civil Service Retirement Act has been amended many times since the original enactment of 1920. At all times and in all versions, the Act has contained language which has the same meaning as the original Section 9 and includes the same guarantees as part of compensation.

This view is reflected in *Kizas v. Webster*, 707 F.2d 524 (D.C. Cir. 1983), where the court of appeals indicated that retirement benefits must be viewed as part of a federal employee's compensation. The *Kizas* court, while rejecting the proposition that government-fostered expectations in the public employment sector may form the basis for a contract or estoppel, unequivocally observed that retirement benefits are one of the "incidents of employee compensation." *Id.*, at 536. The legislative history of the Retirement Act and the relevant statutory language support this position, affirming that an annuitant has a constitutionally protected, compensable property interest in the retirement benefits portion of his/her compensation, no less than the compensable property interest he/she had in the direct pay component of compensation before retirement.

c. Once it is recognized that retirement benefits are part of an employee's compensation, it follows that entitlement to the benefit is a compensable property interest within the meaning of "property" covered by the takings clause of the Fifth Amendment. Here, further reference to *Kizas* is instructive.

In *Kizas* the court of appeals treated the disputed promotion preference as an "additional perquisite" of employment or as an "extra" as to which there was "no indefeasible right." 707 F.2d at 536, 537. As the court stated:

> Because the special preference at issue here was not defined as an element of compensation by any statute or regulation, the employees' argument that they had a vested right to its retention must fail.

Id. However, retirement benefits *are* defined as an element of compensation by the retirement statute, and, therefore, the annuitant does have a "vested right to its retention."

The significance of the fact that retirement benefits have already been earned, and are, therefore, due and owing, was recently explained by this Court in a different but analogous context in *United States v. Larionoff*, 431 U.S. 864, 879 (1977):

> No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits which they had expected to earn. * * * It is quite a different matter, however, for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the congressional action would appear in a different light.

Again, since retirement benefits are part of compensation, they have been earned as well, and it would be quite a "different matter" for the Congress to deprive an annuitant of these benefits. Indeed, as this Court observed, such deprivation would raise "serious constitutional questions." *Id. See also American Postal Workers Union v. U.S. Postal Service*, 707 F.2d 548, 559 (D.C. Cir. 1983) ("A [postal] retiree who meets [retirement] eligibility requirements *acquires an interest protected by the due process clause in benefits at the level provided by the law in effect at the time he or she becomes eligible.*" [Emphasis supplied.]).

In the case at bar petitioners Zucker and Sapienza have a right to receive benefits based upon the annuity computation formula in effect at the time of their retirement, just as the plaintiffs in *Larionoff* had a right to a reenlistment bonus "at the award level then in effect." This is the case for the same reason as in *Larionoff*—namely, because the benefits "had already been earned." However, the benefits already earned and due to petitioners on October 1, 1976, were *retroactively* reduced from March 1, 1976, under the provisions of Public Law 94-440, which diminished the already existing retirement computation formula which was in effect at the time of

their retirement. A constitutional cloud of invalidity was thereby cast over the provisions of Public Law 94-440.

The Fifth Amendment secures property for the individual against taking by the federal government, no less than common law protects it against private deprivation. In either case, the harm is the same, as Justice Brandeis noted: "If (the United States) repudiate their obligations, it is as much repudiation, with all the wrong and reproach that the term implies, as it would be if the repudiator had been a state or a municipality or a citizen." *Lynch v. United States*, 292 U.S. 571, 580 (1934), citing *Sinking Fund Cases*, 99 U.S. 700, 719 (1879). Plainly, the prohibition against the taking of earned compensation extends to acts of Congress as well as actions by government agencies and their officials, for the command is a constitutional one and the vested rights that are thereby protected are immune from destruction, divestment, or impairment through direct legislation no less than by other governmental means. *United States v. Larionoff*, *supra*.

3. Petitioners have a contractual interest in their annuity benefits, alternatively, that amount to a compensable property interest within the protection of the Fifth Amendment.

It is settled law that "valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States." *Lynch v. United States*, *supra*, 292 U.S. at 579. Equally axiomatic is the companion rule that "rights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Id.* Whatever due process protections may be implicated where the government attempts to repudiate its contractual obligations, it is plain that the takings clause of the Fifth Amendment always applies.

The legislative history of the Retirement Act of 1920 clearly demonstrates the congressional intent to create a retirement statute in the nature of an (implied) contract with clear overtones of insurance. Indeed, a large measure of the debate on the bills which became the Act, S-1699 and HR-3149, clearly interpreted the words of the bills to mean that those words created a contract. For example, on April 29, 1920, Representative Nelson, discussing the provisions of Section 9, told the members of the House of Representatives that "[e]very employee coming within the provisions of the Act shall consent and agree to the deductions from salary, pay or compensation, as specified in Section 8, *and by doing so he became a party to the contract between himself and the government.*" 59 Cong. Rec. 6,296 (1920) [Emphasis added.].

Representative Nelson's reference, in the previous paragraph, was not to "a" contract, but was to "the" contract which he suggested was being introduced. The reservation, contained in Section 9, is not inconsistent with the declaration of Representative Nelson that a contract emerged out of the "consent and agree(ment)" to the deductions from salary, pay or compensation, as specified in Section 8. *See* 59 Cong. Rec. 6,929. Earlier Representative Nelson had declared to the House of Representatives that "[t]he man of 30 who participates in a pension retirement plan under which he expects an annuity 35 or 40 years in the future will take some risk of disappointment in accepting any arrangement less secure than a contractual one." 59 Cong. Rec. 6289.

It would appear that Representative Nelson was prophetic when he mentioned the risk in any arrangement less secure than a contractual one, and it was this belief which led him and the other Representatives and Senators who engaged in the extensive debates to seek to invoke in the legislation a contractual concept. If there is any doubt as to whether the basic concept under con-

sideration was to be one of a contractual character, the further words of Representative Nelson should remove such doubt: "* * * The underlying principle of this bill is the recognition of the contractual relationship between the government on one hand as the employer and the civil service personnel on the other hand as the employees." 59 Cong. Rec. 6,288.

Petitioners submit that the court of appeals' decision is clearly inconsistent with the congressional intent, evidenced in the foregoing legislative history, that retirement benefits under the 1920 Retirement Act are to be considered contractual in nature. And *see Steinberg v. United States*, 163 F.Supp. 590, 593 (Ct.Cl. 1958) (Jones, J., concurring) (Where contributions have been made to a retirement fund "a definite contractual relationship . . . becomes effective upon retirement."). As a contractual interest, the COLA benefit was within the protection of the Fifth Amendment. Congress' elimination of the benefit without just compensation was, therefore, constitutionally infirm.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES A. HOBBIE *
Staff Counsel
MARK D. ROTH
General Counsel
American Federation of
Government Employees,
AFL-CIO
1325 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 737-8700

* Counsel of Record

July 1985

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Appeal No. 84-1703

HARRY H. ZUCKER, *et al.*,
Appellants,

v.

THE UNITED STATES, *et al.*,
Appellees.

April 3, 1985

Before FRIEDMAN, BALDWIN and BISSELL, Circuit Judges.

BISSELL, Circuit Judge.

This is an appeal from a decision of the United States District Court for the Southern District of New York, 578 F.Supp. 1239, granting the appellees' motion for summary judgment. The appellants challenged the constitutionality of a statute that modified the cost-of-living adjustment (COLA) for civil service annuitants. We affirm.

BACKGROUND

The appellant retirees receive benefits under the Civil Service Retirement Act, now codified in 5 U.S.C. §§ 8331-8348. In 1962 Congress amended the Civil Service Retirement Act to provide an automatic COLA based on the change in the price index. Postal Service and Fed-

eral Employees Salary Act of 1962, Pub.L. No. 87-793, 76 Stat. 869. In 1969, section 8340(b) was amended by Pub.L. No. 91-93, 83 Stat. 139 (1969) to provide for 1% to be added on top of the COLA ("1% add-on"). In October 1976, Congress amended section 8340(b) by rescinding the 1% add-on and by decreasing the frequency of the COLA calculation. Legislative Branch Appropriation Act of 1977, Pub.L. No. 94-440, 90 Stat. 1462.

After exhausting their administrative remedies, the retirees filed suit in the district court. Appellants Zucker and Sapienza, who retired prior to the 1976 amendment, claimed that that amendment retroactively and unconstitutionally diminished their vested property right in retirement benefits. The other two appellants, Acker and Corcoran, who retired after the 1976 amendment, joined the first two in challenging the constitutionality of the 1976 amendment on the grounds that it violated their property rights without due process of law.

The district court determined that the retirees did not have a constitutionally protected property interest in future COLA benefits. The court also determined they had no contractual right to the benefits.

On appeal, the retirees continue to press their constitutional claims.

OPINION

This court has jurisdiction under 28 U.S.C. § 1295(a)(2) because the retirees' suit was based on 28 U.S.C. § 1346.

Although appellants and appellees have briefed their arguments in terms of the retirees' degree of entitlement to retirement benefits in gross, the issue before us is much narrower. The question is whether a retiree has a constitutionally protected right to receive a COLA in successive years after retirement based on the COLA formula in effect on the date he retired.

I

The retirees argue that their right to future annuity benefits calculated under the 1969 COLA formula is constitutionally protected and that any change to the COLA formula which results in a decrease in their rate of increase is violative of the due process clause.

It is well settled that potential retirees have no protected property interest in any particular level of retirement benefits as they have no legitimate claim of entitlements to benefits which are subject to lawful change. *Nordstrom v. United States*, 342 F.2d 55, 60, 169 Ct.Cl. 632 (Ct.Cl. 1965); *accord American Postal Workers Union v. United States Postal Service*, 707 F.2d 548, 554 (D.C. Cir. 1983), *cert. denied*, 465 U.S. ——, 104 S.Ct. 1594, 80 L.Ed.2d 126 (1984).

To have a property interest in a benefit protected by procedural due process, a person must have a legitimate claim of entitlement to the benefit. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source . . . ." *Id.*

The key words are "claim and entitlement to the benefit." Although the retirees may have a protected property interest when they are entitled to immediate payment under preexisting law, *i.e.*, the payment of an annuity upon retirement, their entitlement to any post-retirement increases in that annuity stems from the independent source that creates and defines their property interest in same, *i.e.*, the COLA provision of the Civil Service Retirement Act, 5 U.S.C. § 8340. Until a retiree becomes eligible to receive a particular COLA, his or her right to that adjustment is subject to any lawful

changes made to the section (5 U.S.C. § 8340) from which the claim to entitlement arises.

Further, legislative acts adjusting the burdens and benefits of economic life have "a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976). These retirees have not carried their burden since they have not demonstrated that the Act was arbitrary or irrational.

II

The employees who retired before the COLA formula changed also assert a vested property right to the 1% add-on provision protected by the takings clause. They maintain that the COLA is a form of deferred compensation and, alternatively, that they have a contractual interest which amounts to a compensable property interest. While the government concedes that the retirees have an economic interest in future COLA benefit levels, it argues that their interest does not rise to the level of property protected by the takings clause. *See Kizas v. Webster*, 707 F.2d 524, 539 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1042, 104 S.Ct. 709, 79 L.Ed.2d 173 (1984).

A

The retirees argue that their property right derives from their statutory entitlement to retirement benefits, a form of deferred compensation. They assert that Congress is without power to diminish their retirement benefits because the Civil Service Retirement Act contains no clause reserving such power. Thus, they conclude that since the COLA is part of their entitled retirement benefits Congress cannot diminish their COLA.

The legislative history lends some support to the view that the basic annuity was intended as deferred compen-

sation. *See e.g.*, 59 Cong.Rec. 6,300 (1920) (R. Hamill) ("Pensions are not gratuities, and they should not be considered as such. They should be looked upon as deferred wages—as payments of wages which were not disbursed at the time when they were earned."); *id.* at 6,378 (R. Mann) (retirement system is "part and parcel of the subject of the wage you pay" and an inducement to keep employees in government service). Similarly, there is case law that can be construed to support a concept of deferred compensation. *See Steinberg v. United States*, 163 F.Supp. 590, 143 Ct.Cl. 1 (1958).[1]

This court does not reach the question of the compensatory nature of the basic annuity to which the retiree became entitled upon retirement. Our ruling is strictly limited to post-retirement COLA benefits.

The retirees cite *United States v. Larionoff*, 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977), as authority for a protected property interest in compensation due "for services already performed, but still owing." *Id.* at 879, 97 S.Ct. at 2159. Although the government in *Larionoff* was required to pay the special reenlistment bonus to service members who had become entitled to it before the statute authorizing it was repealed, the government was not required to provide that benefit prospectively. Likewise, the government here is not required to continue to provide a particular COLA benefit. To hold otherwise would fly in the face of well-established doctrines of federal employment. Generally, as in this case, federal workers serve by appointment, and their rights are therefore a matter of "legal status" even where compacts are made. *Kania v. United States*, 650 F.2d 264,

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[1] The plurality opinion recognizes that the annuity is paid for past services. 163 F.Supp. at 591. The concurring opinion of Judge Whitaker states that an annuity is a vested right "because it is compensation for services already rendered." *Id.* at 594. The concurring opinion of Judge Jones "agree[s] fully" with Judge Whitaker that the annuity is a vested right. *Id.* at 593.

268, 227 Ct.Cl. 458, *cert. denied*, 454 U.S. 895, 102 S.Ct. 393, 70 L.Ed.2d 210 (1981). In other words, their entitlement to retirement benefits must be determined by reference to the statute and regulations governing these benefits, rather than to ordinary contract principles. *United States v. Larionoff*, 431 U.S. at 869, 97 S.Ct. at 2154. "Applying th[is] doctrine[], courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel." *Kizas v. Webster*, 707 F.2d at 535. Even if we had held that the retirement benefits (including COLA formulas) are an incident of employee compensation to which the retirees have an indefeasible right, *Kizas v. Webster*, 707 F.2d at 536, the COLA portion until received by way of an increased annuity is nothing more than a "government fostered expectation" that retirees will be provided retirement annuities which will not be ravaged by inflation. Such an "expectation" does not rise to the level of "property" protected by the takings clause.

B

The retirees assert that because 5 U.S.C. § 8334 required payments of their own money into the Civil Service Retirement and Disability Fund, which payments they say were tantamount to premiums in an insurance program, a contract implied in fact arose. They argue that a contract is private property for purposes of the takings clause, and that a unilateral change in their entitlement under the alleged contract is a taking of that property.

There may be some language in the cases, *see, e.g.*, *Steinberg v. United States*, 163 F.Supp. at 593 (Jones, J., concurring) (where contributions have been made to a retirement fund "a definite contractual relationship . . . becomes effective upon retirement"), and in the legislative history of the Federal Employees Retirement Act

of 1920, Pub.L. No. 66-215, 41 Stat. 614, *see, e.g.*, 59 Cong.Rec. 6,296 (1920) (R. Nelson) (every employee covered by the Act "becomes a party to the contract between himself and the government"), to support the claim of a contract with respect to the basic annuity. As indicated above, however, we deal here only with post-retirement COLA benefits, not with whether the retirees have a right, contractual or otherwise, to their basic annuity.

The retirees have cited no case law holding and no legislative history declaring that retired federal civil servants such as themselves have a contractual right to COLA increases after they retire. In short, the retirees have not persuaded us that the government is contractually bound to continue to provide COLA increases subsequent to retirement.

III

We have carefully reviewed the record and have considered the retirees' other arguments which we conclude are not persuasive. Accordingly, we affirm the decision of the district court granting summary judgment in favor of the appellees.

AFFIRMED.

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 82 Civ. 6079 (IBC)

HARRY H. ZUCKER, PAUL SAPIENZA, SAMUEL ACKER and EDWARD F. CORCORAN,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA, DONALD DEVINE, as Director of the Office of Personnel Management, JAMES CARDINAL, Regional Director, Merit Systems Protection Board, HERBERT ELLINGSWOOD, ARTHUR JOSEPH, JOSEPH E. LIVINGSTON, BONITA KIRKLAND, OTIS L. PACKWOOD, MITCHEL KASTNER and JOSEPH K. RIOTTO, Members of the Merit Systems Protection Board,
Defendants.

Jan. 19, 1984

OPINION

IRVING BEN COOPER, District Judge.

Defendants seek an order, pursuant to Fed.R.Civ.P. 12(b)(6), or, in the alternative, pursuant to Fed.R.Civ.P. 56, dismissing the complaint which alleges that retirement benefits owing to them were made retroactively, and thus unconstitutionally, diminished by an Act of Congress passed on October 1, 1976, P.L. 94-440, Title XIII, § 1306(a), (c)(1), 90 Stat. 1462 ("P.L. 94-440"). Plaintiffs have submitted a certified statement in opposition to defendants' motion.

The material facts of this case are not in dispute; we adopt without hesitation the facts set forth in defendants' Memorandum of Law in Support of the Motion for Summary Judgment (pages 1 through 9). Plaintiffs are retired employees of various agencies of the United States Government and as such come within the purview of the United States Civil Service Retirement System, ("Retirement System") established by Congress on May 22, 1920. The law governing the Retirement System provides that employees covered thereunder are "entitled to an annuity" upon retirement after specified periods of service. 5 U.S.C. § 8336.

The statutory provisions governing the Retirement System are set forth in 5 U.S.C. §§ 8331-8348. The legal issue in question pertains to Section 8340 which provides for cost-of-living adjustments with respect to annuities for eligible employees payable from the Civil Service Retirement and Disability Fund. More specifically, Section 8340(b), as amended by Congress in 1969, provided that:

> Each month the Commission shall determine the percent change in the price index. Effective the first day of the third month that begins after the price index change equals a rise of at least 3 percent for 3 consecutive months over the price index for the base month, each annuity payable from the Fund having a commencing date not later than that effective date shall be increased by 1 percent plus the percent rise in the price index (calculated on the highest level of the price index during the 3 consecutive months) adjusted to the nearest 1/10 of 1 percent.

On October 1, 1976, Congress rescinded that portion of the 1969 amendment which mandated the one percent add-on in addition to the cost-of-living increase. Legislative Branch Appropriation Act of 1976, 90 Stat. 1439. Accordingly, any adjustment of annuities pursuant to

Section 8340 are currently based solely on changes in the cost of living. In addition, any determinations concerning cost-of-living adjustments are made twice a year instead of on a monthly basis. If required, adjustments can be made twice rather than four times annually.

Prior to the 1969 amendment, employees were required to contribute 6½% of their "basic pay" to the Fund. 5 U.S.C. § 8334(a)(1). As a result of the Amendment, each employee subject to the Retirement System contributes 7% of his or her "basic pay" to the Fund. 5 U.S.C. § 8331(3). In addition to employee contributions, the Fund receives matching contributions by the employing agency. *Id.*

The United States Government also makes substantial contributions to the Fund out of its general revenues. Under Section 8348(g), the Department of the Treasury makes a payment of interest on what is termed the "unfunded liability" of the Fund—the excess of estimated benefits payable over otherwise available sources of funding, including employee and employer contributions. 5 U.S.C. § 8331(19). Moreover, under Section 8348(f), the Department of the Treasury also makes a contribution to amortize, over a thirty year period, any "unfunded liability" which results from new or liberalized benefits granted by Congress, excluding any such liability which results from cost-of-living increases.

In August of 1978, plaintiffs presented their claim to the Civil Service Commission alleging that the 1976 amendment to the Civil Service Retirement Act which eliminates the one percent add-on was unconstitutional. They argued that they were entitled to this amount based upon the fact that their contributions to the Fund had been increased by one-half of a percent of their salary at the time the one percent add-on was granted in 1969. *See* Exhibit 3 to Declaration of Assistant United States Attorney R. Nicholas Gimbel. On December 22, 1978, the

Civil Service Commission responded that the increase of one-half of one percent in employee contributions had been provided by Congress in 1969 to help assure that existing levels of benefits to retirees were adequately funded, rather than to fund the one percent add-on. The Commission stated that it could not decline to administer the law as amended by Congress in 1976.

On March 24, 1979, plaintiffs sought administrative review by the Commission's Appeal Review Board whose functions were assumed by the Merit Systems Protection Board. Their appeal was denied on March 6, 1980 by the New York Field Office of the Merit Systems Protection Board.

Plaintiffs Zucker and Sapienza claim that the retirement benefits due them on October 1, 1976 constituted an earned, vested property right which was retroactively and unconstitutionally diminished from March 1, 1976 under the terms of Public Law 94-440, enacted on October 1, 1976. Additionally, all four plaintiffs allege that Public Law 94-440 unconstitutionally, without due process of law and without payment of just compensation invaded the contractual, vested and property rights of the plaintiffs. In support of these claims, plaintiffs provide us with a lengthy legislative history dealing with the enactment of the Federal Employees Retirement Plan as it relates to the issues of contract, insurance and vesting.

We are not persuaded that plaintiffs in the instant case have a constitutionally protected property interest. As the Supreme Court stated in *O'Bannon v. Town Nursing*, 447 U.S. 773, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980), "a legitimate claim of entitlement" to a government benefit does not transform the benefit itself into a vested right. Rather, due process "property interests" in public benefits are "limited, as a general rule, by the governmental power to remove, through prescribed procedures, the underlying source of those benefits." *See Kizas v. Webster*, 707 F.2d 524 (D.C.Cir. 1983).

We are also constrained to examine plaintiffs' allegations in light of the well established legal principle that there is no vested or contractual right to retired pay, which is dependent upon statutory right rather than common law rules governing private contracts. *Flemming v. Nestor*, 363 U.S. 603, 610, 80 S.Ct. 1367, 1371, 4 L.Ed.2d 1435 (1960); *Goodley v. United States*, 441 F.2d 1175, 194 Ct.Cl. 829 (1971); *See also Clark v. United States*, 691 F.2d 837 (7th Cir. 1982). Thus all of plaintiffs' claims derive solely from the statute covering those claims, the Civil Service Retirement Act. It is also well settled that, "public employment does not . . . give rise to a contractual relationship in the conventional sense." *Shaw v. United States*, 640 F.2d 1254, 226 Ct.Cl. 240 (1981). Furthermore, there can be no contractual liability running from the government to one of its employees. *Id.; Kania v. United States*, 650 F.2d 264, 227 Ct.Cl. 458 (1981).

Plaintiffs assert that defendants' reliance on Social Security cases for precedents are erroneous and misapplied. In *Flemming v. Nestor, supra*, the program devised by the Social Security Administration was financed through a payroll tax levied on employees in covered employment and on their employers. The Supreme Court deemed of "special importance . . . the fact that eligibility for benefits and the amount of such benefits, do not in any true sense depend on contribution to the program through the payment of taxes, but rather on the earnings record of the primary beneficiary." The Court concluded "that a person covered by the Act has not such a right in benefit payments as would make every defeasance of "accrued' interest violative of the due process clause of the Fifth Amendment."

The analogy is obvious. We find that benefits payable to federal employees, as is the case with Social Security benefits, as well as annuities payable under the Retire-

ment System, are not contingent on employees' contributions.

Plaintiffs further contend that since Congress enacted a "Reservation Clause" (42 U.S.C. § 1304) in relation to the Social Security Act, reserving the right to revise or modify the Act by subsequent legislation, Congress has no authority to amend the Civil Service Retirement Act without such a clause. We do not agree. Although plaintiffs have failed to submit any authority in support of their contention, it is well settled that benefits granted by the Government confer no right which cannot be revised, modified or recalled by subsequent legislation. *Railroad Retirement Board v. Fritz*, 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575, 99 S.Ct. 802, 805, 59 L.Ed.2d 1 (1979); *Flemming v. Nestor, supra; Stouper v. Jones*, 284 F.2d 240 (D.C. Cir. 1960). The fact that plaintiffs, as employees subject to the Retirement System, contributed 7% of their "basic pay," pursuant to the 1969 amendment does not preclude Congress from amending the basic legislation with which we are here concerned.

It is evident to this Court, from all of the legislative history pertaining to this Act, that the increase in employer and employee contributions from 6½ to 7% was mandated by Congress to insure against depletion of the Fund for future beneficiaries. We are equally convinced that Congress applied a similar rationale when it amended the Civil Service Retirement Act in 1976 to eliminate the one percent add-on which allowed Federal employees a salary adjustment in excess of the cost of living.

It is clear that Congress may grant, increase or decrease benefits subject to the due process limitations against arbitrary action that has no rational justification. *Flemming v. Nestor, supra*, 363 U.S. at 610-11, 80 S.Ct. at 1372-1373. Plaintiffs have failed to persuade us that the statute they seek to declare unconstitutional is arbitrary.

In sum, we follow *Muzquiz v. City of San Antonio*, 378 F.Supp. 949 (1974), *aff'd*, 520 F.2d 993 (5th Cir. 1975):

> [T]he plaintiffs are asking us to reverse 85 years of unbroken Constitutional Law at the Federal level beginning at the Supreme Court with the landmark case of *Pennie v. Reis*, 132 U.S. 464, 10 S.Ct. 149, 33 L.Ed. 426 (1889) and culminating in *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S.Ct. 1367 [1372-1373], 4 L.Ed.2d 1435 (1960) and reiterated in decisions of the 1st, 3rd, 5th, 6th, 9th and District of Columbia Circuits as well as in the District Courts of the country and in the majority of state courts that have considered this matter.
>
> 378 F.Supp. at 955 (footnotes omitted).

Accordingly, we are constrained to, and do, grant defendants' motion for summary judgment, pursuant to Fed. R. Civ. P. 56, dismissing the complaint in its entirety.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 84-1703

82 Civil 6079 (IBC)

HARRY H. ZUCKER, *et al.*,
Appellants,

v.

THE UNITED STATES, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Southern District of New York

JUDGMENT

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED.

Dated April 3, 1985

ENTERED BY ORDER OF THE COURT

/s/ George E. Hutchinson
GEORGE E. HUTCHINSON
Clerk

ISSUED AS A MANDATE: May 15, 1985
COSTS: Against, Appellants, Harry H. Zucker, et al.
PRINTING $422.51
TOTAL $422.51